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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 96-0149 CS
Controlled Substance Excise Tax
For The Tax Period: 1993

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ISSUE

Controlled Substance Excise Tax - Possession

Authority: IC 6-7-3-5; Clifft v. Indiana Department of State Revenue, 660 N.E.2d 310 (1995); Whitt v. Indiana Department of State Revenue, 659 N.E.2d. 512 (1995)

The taxpayer protests assessment of controlled substance excise tax.

STATEMENT OF FACTS

Taxpayer was arrested for possession of cocaine on September 26, 1992. Taxpayer pled guilty to possession of cocaine within 1,000 feet of school property on March 25, 1993. The Department issued the taxpayer a Controlled Substance Excise Tax (CSET) assessment on August 5, 1993. Taxpayer filed a protest of the CSET assessment on March 5, 1996. Multiple attempts to contact the taxpayer were made. A hearing was scheduled for taxpayer to address his protest. Taxpayer failed to appear. Using the best information available, efforts were made to contact taxpayer and taxpayer failed to respond. This determination is made based on the original protest filed with the Department.

DISCUSSION

Indiana Code 6-7-3-5 states:

> The controlled substance excise tax is imposed on controlled substances that are:

(1) delivered,
(2) possessed; or
(3) manufactured;

in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852.

In Clifft v. Indiana Department of State Revenue, 660 N.E.2d 310, 313 (1995), the Court held that a controlled substance excise tax assessment was a punishment for purposes of double jeopardy analysis. The Court further stated that the jeopardy attaches when the Department serves the taxpayer with its Record of Jeopardy Findings and Jeopardy Assessment Notice and Demand. In determining which jeopardy is barred as the second jeopardy the relevant dates must be considered.

Taxpayer was presented with the Record of Jeopardy Findings and Jeopardy Assessment Notice and Demand on August 5, 1993. Pursuant to records provided by the taxpayer, a guilty plea was accepted and judgment entered on March 25, 1993. The Department finds, in accordance with the law as stated in Clifft, that the tax assessment and jeopardy did not come first in time. In this case, the Department's assessment came after the taxpayer's plea agreement.

However, in Whitt v. Indiana Department of State Revenue, 659 N.E.2d. 512 (1995), the Court held that double jeopardy rights are not violated when a defendant is convicted for possessing cocaine within 1,000 feet of school property, and also possessing cocaine without having paid controlled substance excise tax, arising out of the same transaction. Possession within 1,000 feet of school property was a unique element and possession without having paid tax was unique in the second element. Thus, the Department's tax assessment and jeopardy is not barred by principles of double jeopardy. The taxpayer is liable for the tax.

FINDING

The taxpayer's protest is denied.